TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, ~~1903~~ 1904.

No. ~~270~~ 32.

W. O. JOHNSON, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PETITION FOR CERTIORARI, FILED MAY 16, 1904.
CERTIORARI AND RETURN, FILED JULY 12, 1904.

(18929.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 279.

W. O. JOHNSON, PETITIONER,

vs.

SOUTHERN PACIFIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

	Original.	Print.
Writ of certiorari	a	1
Return to writ of certiorari	b	1
Caption	d	1
Transcript from the circuit court of the United States for the district of Utah	1	2
Caption	1	2
Transcript from district court of Boxelder County, Utah	1	2
Complaint	1	2
Petition for removal to Federal court	3	4
Bond for removal	5	5
Order of removal	6	6
Clerk's certificate to transcript	7	7
Answer	8	7
Jury impaneled; trial June 28, 1901	12	11
Verdict and order for judgment	13	11
Judgment, June 29, 1901	13	12
Order extending time to file bill of exceptions	14	12
Stipulation to extend time to prepare bill of exceptions	14	13
Bill of exceptions	15	13
Testimony for plaintiff	15	13
W. O. Johnson	15	13
T. F. Rowland	23	20
S. C. Slaughter	26	24
W. O. Johnson, recalled	30	27

	Original.	Print.
Transcript from the circuit court of the United States for the district of Utah—Continued.		
Bill of exceptions—Continued.		
Recital that record contains all the evidence	31	27
Motion to instruct jury to find for defendant	31	27
Court's charge to the jury and exception thereto	31	27
Certificate of judge to bill of exceptions	31	28
Petition for writ of error	32	28
Assignment of errors	32	28
Order allowing writ of error	32	29
Bond on writ of error	33	29
Clerk's certificate to transcript	34	30
Writ of error and clerk's return	35	30
Citation and admission of service	36	31
Appearance for plaintiff in error	38	32
Appearance for defendant in error	38	32
Appearance for defendant in error	39	33
Order of submission	39	33
Opinion of the court, Sanborn, J	41	34
Opinion of Thayer, J	53	45
Judgment	55	46
Clerk's certificate to transcript	56	47
Stipulation as to printing record in No. 362 and this case	58	47

a UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the eighth circuit, greeting:

Being informed that there is now pending before you a suit in which W. O. Johnson is plaintiff in error and Southern Pacific Company is defendant in error, which suit was removed into the said circuit court of appeals by virtue of a writ of error to the circuit court of the United States for the district of Utah, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the

b Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the third day of June, in the year of our Lord one thousand nine hundred and three.

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

RETURN TO WRIT.

UNITED STATES OF AMERICA,
Eighth circuit, ss:

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same (except the proceedings and papers filed on the writ of error from the Supreme Court).

In witness whereof I hereto subscribe my name and affix the seal of the United States circuit court of appeals for the eighth circuit, at office in the city of St. Louis, Missouri, this eleventh day of July, A. D. 1903.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States circuit court of appeals for the eighth circuit.

c (Indorsed:) File No. 18929. Supreme Court of the United States. No. 279, October term, 1903. W. O. Johnson *vs.* Southern Pacific Company. Writ of certiorari. Filed June 8, 1903. John D. Jordan, clerk.

d Pleas and proceedings in the United States circuit court of appeals for the eighth circuit, at the May term, 1902, of said court, begun and held at the United States court-house in the city of St. Paul, Minnesota, on the first Monday in May, to wit, the fifth day of May, A. D. 1902, before the honorable Walter H. Sanborn and honorable Amos M. Thayer, circuit judges, and honorable William Lochren, district judge.

Attest:

[SEAL.] JOHN D. JORDAN,
Clerk of the United States circuit court of appeals for the eighth circuit.

Be it remembered that heretofore, to wit, on the twentieth day of February, A. D. 1902, a transcript of record, in pursuance to a writ of error directed to the circuit court of the United States for the district of Utah, was filed in the office of the clerk of the United States circuit court of appeals for the eighth circuit, wherein W. O. Johnson was plaintiff in error and the Southern Pacific Company was defendant in error, which said transcript of record is in the words and figures following, to wit:

1 UNITED STATES OF AMERICA,
District of Utah, ss:

At a stated term of the United States circuit court, begun and held at the building used as an United States court-house in the city of Salt Lake, in said district, on the first Monday, being the 2nd day of December, in the year of our Lord one thousand nine hundred and one, and of the Independence of the United States of America the one hundred and twenty-sixth year.

Present: Honorable John A. Marshall, United States district judge for the district of Utah.

Transcript of the record.

W. O. JOHNSON, PLAINTIFF,
vs.
SOUTHERN PACIFIC COMPANY, A CORPORATION, defendant.

Complaint.

Be it remembered that heretofore and on the 6th day of October, 1900, said plaintiff filed his complaint in the first judicial district court of the State of Utah in and for Box Elder County, which, being entitled therein and in this cause, is in words and figures following, to wit:

Plaintiff complains of the defendant and for cause thereof alleges—

1. That defendant is a corporation organized and existing under and by virtue of the laws of the State of Kentucky, and at all the times hereinafter mentioned was and is engaged in operating a railroad between the city of San Francisco, State of California, and the city of Ogden, State of Utah, and at all of said times was and is a common carrier, engaged in interstate commerce by railroad, and was, on the fifth day of August, 1900, hauling and using on its line a certain locomotive engine, hereinafter more fully described, used in moving interstate traffic.

2. That on the fifth day of August, 1900, in the day time thereof, the said plaintiff, W. O. Johnson, was acting as head brakeman upon a freight train, composed of freight cars and a locomotive engine, above mentioned, of the said company, said engine at the said time being used in moving interstate traffic, and whilst the said plaintiff was in the employ
2 of the said company, as aforesaid, the said freight train upon which said plaintiff was working ran into the town of Promontory, in Box Elder County, State of Utah, and thereupon the defendant company ordered and directed the said plaintiff to uncouple the said

engine from the said train upon which the plaintiff was working, which he did accordingly, and to couple the said engine onto a certain dining car, also used in moving interstate traffic, which was standing at the time above mentioned in the yards of the said company in the said town of Promontory.

3. That the said engine was equipped with what is commonly known as a Jenney coupler, and that the said dining car was equipped with what is commonly known as a Miller hook, which two distinct kinds of couplers were not couplers which, acting together, would couple automatically by impact, and therefore had to be coupled by hand by a person passing between the ends of said car and engine and uniting the same by means of a link and pin.

4. That it was the duty of said defendant company to furnish its cars and locomotives with coupling appliances automatic in their character and which would and should couple automatically by impact, and not necessitating the brakeman of said company going between the cars to couple the same, all of which defendant company well knew, as also the condition of said cars in that respect, and is hereinafter set out, and said defendant company negligently and carelessly used, operated, and maintained the said locomotive and car in such condition for a long period of time before said accident, by reason of which negligence and carelessness plaintiff was injured, as herein set out.

5. That the said defendant company ordered and directed the said plaintiff to couple the said engine to said dining car, as aforesaid, and in order to do so he was obliged to use a link and pin and pass in between the said dining car and said moving engine, which he did, and while endeavoring to couple together the said engine and dining car with such link and pin, with all due care and without any fault or negligence on his part, his left arm and hand was caught between the said couplers and ends of said dining car and moving engine, thereby bruising and crushing the same and rendering it useless and diseased and necessitating the amputation of said hand and forearm.

6. That the said Miller hook on said dining car was out of order, in that it did not project in a straight line from under the center of the said dining car, which fact made it more difficult and more dangerous
3 to effect a coupling between the said car and engine than it would otherwise have been, and that said company knew or with reasonable diligence and care could have known that said Miller Hook was out of repair, and that the said plaintiff did not know that the same was out of order nor had he any means of obtaining said knowledge.

7. That at the time of the injury the plaintiff was a strong, healthy, able-bodied man of the age of thirty-three years, and earning $90 per month.

8. That by reason of the injury as above described he was in the hospital two months, and lost the use of his said hand and forearm and suffered great bodily and mental suffering and expense, and with a likelihood of further expense and suffering by having to undergo another amputation of the arm on account of its shattered condition.

9. That by the said wrongful act of the said defendant the said pl intiff is rendered a cripple for life and is unable to perform manual labor, and he has suffered damage thereby in the sum of $20,000.

Wherefore plaintiff demands judgment for the sum of $20,000 and for costs of this suit and for such other and further relief as to the court may seem just.

W. L. MAGINNIS,
Attorney for Plaintiff.

STATE OF UTAH,
County of Weber, ss:

I, W. O. Johnson, after having been first duly sworn on oath, say as follows:

That I am the plaintiff in the above-entitled action and have read the foregoing complaint and know the contents thereof, and that the same is true to my own knowledge except as to matters therein stated upon information and belief, and as to those matters I believe it to be true.

W. O. JOHNSON.

Subscribed and sworn to before me this 3rd day of October, 1900.

[SEAL.] E. S. ROLAPP,
Notary Public.

(Indorsements:) No. 371. Title court and cause. Complaint. Filed October 6th, 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900, Jerrold R. Letcher, clerk.

And afterwards and on the 30th day of October, 1900, said defendant filed in said State court its petition for removal to the
4 United States circuit court for the district of Utah, central division, which being entitled therein and in this cause, is in words and figures following, to wit:

Petition for removal to the United States circuit court, district of Utah, central division.

To the honorable, the first judicial district court of the State of Utah, in and for the county of Box Elder:

Your petitioner respectfully shows that it is the defendant in the above-entitled action; that it is not a resident or a citizen of the State of Utah, but is a citizen of the State of Kentucky, wherein this defendant was duly incorporated as a corporation; that the matter and amount in dispute in this suit exceeds, exclusive of interest and costs, the sum of $2,000.00; that said suit is of a civil nature, being an action brought by plaintiff against said defendant to recover the sum of $20,000.00 damages for wrongs and injuries inflicted on the plaintiff on or about August 5th, 1900, near Promontory, in Box Elder County, State of Utah, through the alleged carelessness and negligence of the defendant while said plaintiff was in the employ of the defendant as head brakeman on a freight train, all of which will more fully appear by reference to the verified complaint on file herein, to which reference is hereby made; that the controversy in said suit is wholly between citizens of different States, to wit, between your petitioner, who was at the time of the bringing of this suit and at this time is a citizen and resident of the State of Kentucky, wherein and whereby and under the laws of which State it

was duly incorporated. That said plaintiff is a resident of the State of Utah, and was such at the time of the institution of this suit and now is a citizen and resident of the State of Utah; that your petitioner offers herewith a bond, with good and sufficient sureties for the entering in the circuit court of the United States (central division) for the district of Utah, on the first day of its next session, a copy of the record in this suit, together with all files, papers, and pleadings filed herein, and for all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully and improperly removed thereto.

Your petitioner prays this honorable court to proceed to further herein, except to make an order for the removal of said cause to the said circuit court of the United States, and to accept the said sureties and bond and to cause the record herein, together with all files and papers herein, to be removed to said circuit court; and your petitioner will ever pray.

MARSHALL, ROYLE & HEMPSTEAD.
Attorneys for said Petitioner.

5 STATE OF UTAH,
County of Salt Lake, ss:

Thomas Marshall, being first duly sworn, deposes and says: That he is one of the attorneys of the above-named petitioner; that he has read the foregoing petition and knows the contents thereof and the said allegations therein contained are true, as he verily believes.

THOMAS MARSHALL.

Subscribed and sworn to before me this 26 day of Oct., 1900.

[SEAL.] LULA GEOGHEGAN,
Notary Public.

(Indorsements:) No. 371. Title, cause, and court. Petition for removal, etc. Filed Oct. 30", 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

Bond for removal.

And afterwards, and on the same day, said defendant filed in said State court its bond on removal to the United States circuit court for the district of Utah, which, being entitled therein and in this cause, is in words and figures following, to wit:

Know all men by these presents: That the Southern Pacific Company as principal, and John E. Dooly and Harry T. Duke as sureties, are held and firmly bound unto W. O. Johnson in the sum of $500.00, to the payment of which well and truly to be made, we jointly and severally bind ourselves, our representatives, heirs, and assigns by these presents. Signed this 26 day of October, 1900.

The condition of the above obligation is such that: Whereas said W. O. Johnson has commenced an action in the district court of the first judicial district of the State of Utah, county of Box Elder, against the Southern Pacific Company, to recover the sum of $20,000.00 damages for injuries and wrongs alleged to have been done to plaintiff while employed as a brakeman by the said defendant, at or near Promontory, on the line of defendant's road in the county of Box Elder, State of

Utah, on or about the 5th day of August, 1900, while said plaintiff was engaged as an employee of said defendant on one of its trains by the carelessness and negligence of the said defendant, all of which will more fully appear by reference to the complaint of plaintiff now on file in this court; that said defendant has filed its petition for removal of said action to the circuit court of the United States (central division) for the district of Utah.

6 Now, therefore, if the said defendant shall enter and file, or cause to be entered and filed in said circuit court of the United States, a copy of the record in said case, including all the files and pleadings now on file in said cause, on or before the first day of the next session thereof, and shall pay all costs that may be awarded by said circuit court, if said court shall hold that this suit was wrongfully and improperly removed thereto, and shall further appear and give special bail in said suit, if the same was originally requisite in said cause, and shall do such other and proper acts as may be requisite to be done on the removal of said cause, then this obligation shall be void; otherwise, in full force and effect.

SOUTHERN PACIFIC COMPANY,
By THOMAS MARSHALL, *its Attorney.*
JOHN E. DOOLY,
HARRY T. DUKE, *as Sureties.*

STATE OF UTAH,
County of Salt Lake, ss:

John E. Dooly and Harry T. Duke, of the said county, sureties named in the foregoing bond, being duly sworn, each for himself, says: I am a resident of the State of Utah, and a property holder therein, and am worth the sum of $500.00 over and above my debts and liabilities, exclusive of property by law exempt from execution; that I have property in the State of Utah liable to execution of the value of more than $500.00.

JOHN E. DOOLY.
HARRY T. DUKE.

Subscribed in my presence by John E. Dooly and Harry T. Duke, and by them severally sworn to before me this 26 day of October, 1900.

[SEAL.] LULA GEOGHEGAN.

The foregoing bond is hereby approved.

CHAS. H. HART, *Judge.*

BRIGHAM CITY, *Nov. 14th, 1900.*

(Indorsements:) No. 371. Title, court, and cause. Bond for removal. Filed October 30th, 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

Order for removal.

And afterwards, and on the 30th day of October, 1900, said defendant filed in said State court its order for removal, which, being entitled therein and in this cause, is in words and figures following, to wit:

7 The defendant herein having within the time provided by law filed its petition for the removal of this cause to the circuit court

of the United States (central division) for the district of Utah, and having at the same time offered its bond in the sum of $500.00, with John E. Dooly and Harry T. Duke, good and sufficient sureties, pursuant to the statute and conditioned according to law;

Now, therefore, this court does hereby accept and approve of said bond, and accept said petition, and it is ordered that this case be removed for trial to the circuit court of the United States (central division) for the district of Utah, pursuant to the statute of the United States, and that all further proceedings of this court be [staid].

Dated this 13th day of November, 1900.

CHAS. H. HART, *Judge.*

(Indorsements:) No. 371. Title court and cause. Order for removal. Filed October 30th, 1900. Geo. L. Graehl, clerk. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

Clerk's certificate on removal.

And afterwards and on the 14th day of November, 1900, the clerk of said district court attached the following certificate to the papers in this cause, which being entitled in said district court and in this cause is in the words and figures following:

STATE OF UTAH,
County of Box Elder, ss:

I, George L. Graehl, county clerk of Box Elder County, Utah, and ex officio clerk of the district court of the first judicial district in and for the county of Box Elder, State of Utah, do hereby certify that the foregoing papers hereunto attached are the original complaint, petition for removal, order for removal, bond for removal, and summons, which comprises all the papers in the above-entitled action as the same appears on record in my office.

Witness my hand and the seal of said district court this 14th day of November, A. D. 1900.

[SEAL.] GEO. L. GRAEHL,
Clerk of District Court.

(Indorsements:) 388. Filed Nov. 27, 1900. Jerrold R. Letcher, clerk.

And thereupon, and on the 27th day of November, 1900, said papers on removal were filed in and said action duly entered upon the register of actions of said United States circuit court.

8 *Answer.*

And afterwards and on the 11th day of December, 1900, said defendant filed its answer to said complaint, in this court, which being entitled therein and in this cause, is in words and figures following, to wit:

Now comes said defendant and makes this its answer to the complaint of plaintiff, first filed in the district court of the first judicial district in and for Box Elder County, in the State of Utah, and subsequently transferred to and now pending in the above-entitled court.

Defendant admits the first subdivision of plaintiff's complaint, but denies that at the time of the alleged injuries to plaintiff on said fifth day of August, A. D. 1900, said locomotive engine was being used in moving interstate traffic.

Defendant admits that on the fifth day of August, 1900, plaintiff was acting as head brakeman upon a freight train, composed of freight cars and a locomotive engine of said company, which, at and prior to its arrival at said Promontory, was being used in moving interstate commerce, and that on arriving at Promontory plaintiff was ordered and directed to uncouple the said engine from said train, which he did accordingly, and subject to the rules and regulations of defendant was directed to couple the said engine onto a certain dining car, which was standing at the time in the yard of said company in said town of Promontory; but this defendant denies that on said fifth day of August, or at the time of the alleged injuries to plaintiff, said dining car was being used in moving interstate traffic.

Defendant admits the third subdivision of said complaint.

Defendant denies that as applied to said engine after it was parted from said freight train, and said dining car standing in the yards of defendant at Promontory, and at the time said alleged coupling was attempted, it was the duty of said defendant at or prior to said attempted coupling to furnish said dining car with a coupling appliance, automatic in its character, or which should couple automatically by impact, not necessitating the brakeman going between the cars to couple the same; or that defendant well knew the same, or knew that said dining car had not a reasonably safe and satisfactory coupler upon the end thereof that was to be coupled, or that defendant negligently or carelessly used or operated said dining car then standing in the yards of said company, or that by reason thereof said plaintiff was injured as alleged in said complaint.

9 Defendant admits that in ignorance of the condition of said dining car it ordered or directed said plaintiff to couple said engine to said dining car, but that plaintiff well knew that it was his duty nevertheless to examine the couplings upon the engine and the dining car, and if the same were defective, not to obey such order but report the same to the conductor or yardmaster.

Defendant denies that when plaintiff was ordered to couple said cars, the couplings of which were defective, it was his duty or he was obliged to make said coupling, or to use a link or pin, or pass in between the said dining car and said moving engine, or that while endeavoring to couple together the said engine and dining car with link or pin, or with due care, or without any fault or negligence on his part, his left arm or hand was caught between the said couplers or ends of said dining car or moving engine, thereby or by reason thereof bruising or crushing the same, or rendering it useless or diseased, or necessitating the amputation of said hand or forearm.

Defendant denies that at the time of said alleged attempt at coupling it knew, or with reasonable diligence or care it could have known, of said Miller hook, or that said Miller hook was out of repair; and this defendant alleges that it could only know of such defects or want of repair through its employees who did coupling, and it was their duty, as

it was the duty of plaintiff, in case of any such defects as alleged, not to make the coupling, but to report such defects to defendant.

Defendant denies that plaintiff did not know, nor had any means of obtaining knowledge, that said couplings were out of order. On the contrary defendant alleges that before attempting to make such coupling it was plaintiff's duty to examine said couplings to see if they were in good order, to take sufficient time so to do, and in case they were defective to run no risk, but report such defects to defendant.

As to whether or not, at the time of said injury to plaintiff, he was a strong, healthy, or able-bodied man, defendant has no knowledge or information thereof sufficient to form a belief, and therefore denies the same.

Defendant denies that by reason of any negligence or want of due care on the part of defendant, as alleged in said complaint, or by reason of plaintiff's injuries as described in said complaint, plaintiff was in the hospital two months, or lost the use of his said hand or forearm, or suffered great bodily or mental suffering or expense, or with a lik'lihood of further expense or suffering by having to undergo another amputation of the arm on account of its shattered condition.

Defendant denies that by the said alleged wrongful act or acts of defendant the said plaintiff is rendered a cripple for life, or is unable to perform manual labor, or has suffered damage thereby in the sum of twenty thousand dollars or in any sum whatever.

And for a further and separate answer to said complaint defendant alleges that prior to the said 5th day of August, 1900, said plaintiff had been in the employ of defendant for about six years, about two years as engine wiper, about two years as fireman, and about two years as brakeman upon its said road. That in all these positions, especially in the two last named, the printed rules and regulations of defendant in its operating department on its said road were furnished to and received by said plaintiff, and the rules and regulations in force at the time of the alleged injury to plaintiff on August 5th, 1900, had, prior to that time, been furnished to plaintiff and he knew and was familiar with said rules. That by these rules it was among other things provided, in reference to employees on defendant's said road, and as governing said plaintiff, as one of its said employees, that "Employees are required to be conversant with and obey the rules and special instructions." "If in doubt as to their meaning they must apply to the proper authority for an explanation." Also the following: "Persons employed in any service on trains are subject to the rules." Also the following: "Great care must be exercised by all persons when coupling cars. Inasmuch as the couplers of cars and engines cannot be uniform in style or strength, and are liable to be broken from various causes so as to render it dangerous to expose the hands, arms, or persons of those engaged in making couplings, all employees are enjoined before coupling cars or engines to examine and to know the kind and condition of the drawhead, drawbar, link-and-coupling apparatus, and are forbidden to place in trains any car with a defective coupling until they shall have reported the defect to the conductor or yardmaster. Sufficient time may be taken by employees in all cases to make the examination required."

That on said 5th day of August, 1900, said dining car was, and had been, standing still and alone in the yards of defendant at said town of

Promontory, and the engine of the freight train was moving towards it to be coupled thereto and to turn said dining car about upon a turntable. That plaintiff had ample opportunity to examine and know, and he did know, the condition of the coupler upon said dining car before
11 attempting to couple the same to said engine, and it then and there under said rules became his duty not to make said coupling, but to report the defects in the dining-car coupling to the conductor or yardmaster of defendant. But said plaintiff disregarding his said duty wilfully, carelessly, and negligently failed to report said defective coupler to said conductor or yardmaster, and in defiance of said rules and his said duty in the premises wilfully, carelessly, and negligently attempted to make said coupling, and thereby, without any fault or negligence of defendant therein, suffered the wrongs and injuries complained of by him.

And for a further and separate answer to said complaint defendant alleges: That defendant was a corporation at the time of said alleged injury to plaintiff, and also in the usual operation of trains on its said road and could only know of defects in the coupling apparatus of its cars and trains through the persons who used and operated these couplings, especially the brakeman who usually assisted in making couplings; and defendant was compelled to rely upon these persons as to defects in couplings which required mending or replacing. That plaintiff had, prior to his said injuries, been employed upon the line of defendant's road about six years, for about four years of which time he was acting as fireman or brakeman, and as brakeman he was thoroughly familiar with his duty in coupling cars. That he knew the rules of said defendant hereinbefore in this answer to said complaint quoted, and knew of the defects in the coupler of the dining car, and knew the danger he ran in trying to couple the engine and the dining car, and so knowing, and in violation of his duty to defendant he wilfully and carelessly assumed the risk of attempting to make such coupling, and thereby, without any negligence or carelessness by defendant therein, suffered the injuries complained of by him.

MARSHALL, ROYLE & HEMPSTEAD,
Attorneys for Defendant.

STATE OF UTAH,
County of Salt Lake, ss:

Thomas Marshall, having been first duly sworn upon his oath, says: I am one of the attorneys for said defendant in the above-entitled action. I have read the foregoing answer and know the contents thereof, and the same is true of my own knowledge except as to the matters therein stated on information and belief, and as to those matters I believe it to be true, and the same is true to my best knowledge, information, and belief. My knowledge, information, and belief are derived from
12 documents, information, and evidence furnished me by said defendant. This verification is made by me, because defendant is a corporation and I am one of its attorneys in said action, and also the duly authorized agent of defendant in the State of Utah upon whom all legal process in said State can be served.

THOMAS MARSHALL.

Subscribed and sworn to before the undersigned notary public in and for said county of Salt Lake this the 11 day of December, A. D. 1900, as witness my hand and my notarial seal.

[SEAL.] LULA GEOGHEGAN,
Notary Public.

STATE OF UTAH,
County of Salt Lake, ss:

I, Thomas Marshall, of counsel for defendant, hereby certify that in my opinion the foregoing answer, and the defense therein set forth, is well founded in point of law.

THOMAS MARSHALL.

Filed December 11, 1900. Jerrold R. Letcher, clerk.

Order trial begun.

And afterwards and on June 28, 1901, the same being one of the regular juridical days of the May term, 1901, of this court, the following order, entitled in this cause, made and entered in the minute book, to wit:

At this day comes said plaintiff, by William L. Maginnis, his attorney, and the said defendant, by Thomas Marshall and J. C. Royle, its attorneys, also comes. And thereupon comes a jury, to wit: W. F. Critchlow, John McNeal, C. D. Tyree, W. G. Smith, J. H. Moulton, George Beard, Henry T. Knowles, James Nolan, Thomas C. Griggs, David S. Tracy, Henry T. McEwan, and Peter Sutton, twelve good and lawful men, and they are duly selected and tried, empaneled and sworn to well and truly try the matter at issue herein joined, and a true verdict give according to the evidence. And W. O. Johnson and T. F. Rowland, are sworn and examined as witnesses on the part of said plaintiff. And thereupon by consent of said parties in open court, it is ordered that D. S. Tracy, one of the jurors on this case, be excused from further service herein, and that the further trial be had with eleven jurors. And the hour of adjournment having been reached, the further trial of this action is postponed until to-morrow morning at the hour of ten o'clock. And said jurors being now here by the court duly admonished and cautioned as to their duties as jurors during the adjournment of the court, are permitted to separate to meet the court as aforesaid.

13 And afterwards, and on the 29th day of June, 1901, of the May term, the same being one of the regular juridical days of said May term, the following proceedings were had, which being entitled in this cause, are in words and figures, to wit:

At this day come again said parties, by their respective attorneys as aforesaid. And said jurors being now all here present and in the jury box, the trial of this action is resumed, and S. C. Slaughter and W. O. Johnson are examined as witnesses on the part of plaintiff, which concluded the evidence of plaintiff. Whereupon said defendant rests its case and moves the court to peremptorily instruct the jury to return a verdict in its favor, and the court having heard the arguments of counsel, and being well advised in the premises, sustains said motion, and so

instructs said jurors, and said jurors, without leaving their seats, upon their oaths do say: "We, the jury in the above-entitled action, find the issues joined in favor of the defendant. W. F. Critchlow, foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is considered, ordered, and adjudged by the court that said plaintiff take nothing by his complaint herein, and that said defendant go hence without day, and have and recover of and from said plaintiff its costs by it in this behalf incurred, taxed at the sum of $, and let execution issue therefor.

Judgment.

And afterwards, and on the said 29th day of June, 1901, the following judgment was entered in the judgment book of this court, which being entitled in this cause, is in words and figures, to wit:

At this day, this court having been regularly convened according to law, pursuant to adjournment, with officers present as noted on June 26, 1901, the following judgment was by the court ordered entered of record herein, to wit:

Now, on this 29th day of June, 1901, a juridical day of the May term, 1901, of said court, before the Honorable John A. Marshall, judge, W. L. Maginnis appearing as attorney for said plaintiff, and Thomas Marshall and J. C. Royle appearing as attorneys for said defendant, and a jury having been heretofore empaneled and duly sworn, thereupon certain testimony and evidence was introduced on behalf of said plaintiff, and the case of both parties having been rested, the motion of defendant to instruct the jury to return a verdict in its favor was sustained by the court and the jury so instructed. Whereupon said jurors, without leaving their seats, upon their oaths returned the following verdict,
14 to wit: "We, the jury in the above-entitled action, find the issues joined in favor of the defendant. W. F. Critchlow, foreman."

Wherefore, by virtue of the law and by reason of the premises aforesaid, it was considered, ordered, and adjudged by the court that said plaintiff take nothing by its complaint herein, and that said defendant go hence hereof without day, and do have and recover of and from said plaintiff its costs by it in this behalf incurred, taxed at the sum of $, and let execution issue therefor.

Order and stipulation in re. Time to file bill of exceptions.

In the United States circuit court for the district of Utah.

W. O. JOHNSON
vs. } No. 388.
SOUTHERN PACIFIC COMPANY.

At this 16th day of July, 1901, on motion of said plaintiff, by W. L. Maginnis, his attorney, it is ordered that he have time and until thirty days from this day in which to prepare, serve, and file his bill of the exceptions by him reserved on the trial of this action.

JOHN A. MARSHALL, *Judge.*

Filed and entered July 16, 1901. Jerrold R. Letcher, clerk.

And on the 14th day of August, 1901, stipulation in writing was filed by the respective parties hereto, which being entitled in this court and cause, is in words and figures following, to wit:

It is hereby stipulated by and between said parties, by their respective attorneys, that the time allowed plaintiff, by an order of this court, in which to prepare, serve, and file his bill of exceptions herein may be extended twenty days.

August 14th, 1901.

W. L. MAGINNIS, *Attorney for Plaintiff.*
MARSHALL, ROYLE & HEMPSTEAD,
Attorneys for Defendants.

Filed August 14, 1901. Jerrold R. Letcher, clerk.

And afterwards, and on the 31st day of August, 1901, plaintiff lodged with the clerk of this court its bill of exceptions, reserved by him on the trial of this cause, which, on the 16th day of September, 1901, was duly allowed, settled, and made part of the record herein, and
15 which was duly signed and sealed by the judge of this court, which is in words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States in and for the district of Utah.

W. O. JOHNSON, PLAINTIFF,
vs. } 388.
SOUTHERN PACIFIC COMPANY, DEFENDANT.

Be it remembered that on the trial of this action at the May term, 1901, of said court, before the honorable John A. Marshall, judge, and a jury of twelve good and lawful persons, beginning on Friday, the 28th day of June, 1901, at Salt Lake City, in said district, W. L. Maginnis appearing as attorney for said plaintiff and Thomas Marshall and J. C. Royle appearing as attorneys for said defendant, the following proceedings were had—that is to say:

The plaintiff, to maintain the issues on his part, gave in evidence the following—that is to say:

W. O. JOHNSON, plaintiff, being first duly sworn in his own behalf, testified as follows:

My name is W. O. Johnson; I live in Ogden, and I have lived there about twelve years; during most of that time I have been engaged in the railroad business; having during that time worked for the Union Pacific and Southern Pacific Railroad companies, in the car department on the Union Pacific and as engine wiper, fireman, and brakeman on the Southern Pacific Railroad. I was employed as brakeman on the Southern Pacific Railroad about two years.

On the fifth day of August last I was in Promontory, working in the capacity of brakeman for the Southern Pacific Company, on train No. 207, if I am not mistaken. We came from Terrace that morning; were engaged in the service between Carlin and Ogden. The number of the engine which brought in our train was 1485 and ran between Ogden and Carlin on its regular run.

Train No. 207 is a regular train running between Ogden and San Francisco. The same cars loaded go right through. Engines are usually changed at Carlin and Terrace, but when out of order are changed at other places. This particular engine on this particular day took up the cars at Tarrace to carry them to Ogden, and when we arrived at Promontory I, as head brakeman, was ordered by my conducto r (Conductor Sleeth) to uncouple the engine from our train, go into the cut-off,
16 get the dining car standing there, bring it out on turntable and turn it around, and then couple the train onto the engine again.

The engine was equipped with the Janney or California coupler, a knuckle coupler which opens and closes swinging on a pin similar to a hinge. These couplers open in opposite directions, and when two come together open, they close and make the coupling by impact, and are held in place by a key which is raised by means of a lever on the outside of the car or engine. In the absence of the key the coupler opens and shuts with but little resistance, and when the key is raised the effect is the same. The key is dropped with the same lever, and when down holds the coupling from opening and coming uncoupled.

The Miller hook is made something on the same principle, but will not work with a Janney, for the reason that the hook is on the same side as the Janney and instead of coupling passes over it.

This dining car was standing on a side track at Promontory, a telegraph station, where there are side tracks and switches, etc., but no particular yard and no yard master or switch engines; work done there by engines is done by road engines.

After Conductor Sleeth directed me I cut the engine off of my train, went ahead and threw the switch, let the engine go in on the cut-off to the dining car, which was on the side track in order to put it on the turntable and turn it around as I was ordered by my conductor. I tried to make the coupling with a link and pin, but I failed to make it the first time; I gave the engineer the signal to slack ahead and come back the second time, and I failed again, the link would not enter the Janney; and the third time my arm got caught between the engine bumper and the dining-car vestibule bumper.

I got caught as I was pulling the Miller hook over toward me with my right hand and holding the pin which I was to drop in the Janney coupler with my left hand, and by watching the two points my arm got caught between the bumpers.

I did not notice that there was anything the matter with the Miller hook, except that it was slightly tipped, so that it hung down on one side on account of the strap it rested on being tipped. That had the effect of turning the link with it and made it more difficult to couple.

I have made the same kind of coupling before hundreds of times.

I do not remember that I ever handled that particular car before it was the Del Monte.

My arm was crushed above the wrist. I was taken to the caboose first but afterwards was put on train No. 2 and taken to Ogden hospital,
17 where I remained fourteen days, during which time my arm was amputated once, they took it off high enough the first time so that they would not have to do it again.

There is not much left of my arm now. At that time I was healthy and strong, nothing the matter with me whatever. I was thirty-three

years old and earning between eighty and ninety dollars per month, with a guarantee of eighty dollars per month. We generally averaged about ninety dollars per month.

By reason of the Miller hook being tipped it made it more difficult to make the coupling; it did not rest level and slide level; the nuts were loose on the side away from me, which made the Miller hook turn; that made it hard to make the coupling.

The Miller hook and Janney coupler will not couple automatically by impact.

I had seen this dining car on the road before; I do not know where it ordinarily ran; I would see it almost anywhere wherever a train would pass us with it on; I ran on train between Ogden and Carlin, Nevada. I knew that that car was used regularly on the road between Carlin and Ogden.

Cross-examination by Mr. ROYLE:

I have been in the service of the company about six years; had two years' experience as a brakeman.

Q. Did you know the difficulties in regard to coupling cars?

A. Yes, sir; I knew what the difficulty of the coupler was, because it was a Janney and a Miller, and I most certainly knew it was a "difficulty coupler."

It was dangerous to go between those cars, but I was ordered to do it.

I knew it was a dangerous coupler, but I was taking my time; I was trying three different times.

Q. I see you did. When you first went there did you see the condition it was in?

A. I seen it was a Miller.

Q. And a Janney coupler?

A. Yes, sir.

Q. And did you see this defective part?

A. Well, it was not defective enough to stop me from doing my work; it was defective in that it was kind of tipped, but not otherwise. If it had been coupled with a Miller hook it would not have been difficult; that little tip on it would not hurt, but with a Janney it was difficult.

I saw that it was difficult.

If the Miller hook had been brought in contact with a Miller hook there would have been an automatic coupling; but as far as the Janney was concerned it would not couple automatically.

18 I went in the first time and failed, and saw the difficulties when I did it, but I was supposed to couple it. I was supposed to do that work and was trying it again; I went in the second time.

I had not control over the engine. I gave the engineer the signals, and he obeyed them by going and coming, and a second and third time I went in between those cars, knowing the danger. I was not forced to go in any more than that I knew the consequences if I did not do the work I was told to do. I was always instructed to protect myself, but didn't in this case, because I was ordered to do that coupling.

Q. Well, is that order imperative under any circumstances, that you do the coupling whether dangerous or not dangerous? Do you mean to say

that the conductor meant that when he gave the order that you would run the risk of your life by doing that coupling?

A. I did not run any more risk that time than I had done times and times before.

Q. I understand that you knew the danger, and time and again you had done it. Now, do you understand that this conductor intended you to risk your life when he gave that order to go and do that coupling?

A. He did not intend for me to risk my life, but he intended for me to do that coupling.

Q. Did he intend for you to do that coupling whether practicable or not?

A. It was practicable.

Q. It was not practicable without danger?

A. It was "practical."

Q. Was it practicable without danger?

A. Well, there is danger in all couplers, provided they are not coupled automatically.

Q. You do not answer my question squarely. When you are instructed to take a car is it your duty to take the car and move it, whether it is dangerous or out of order, no matter what is the matter with it; is it your duty to do it under any circumstances, no matter what is the matter with that car?

A. It is not; but the coupler was not broke or anything.

Q. You do not answer my question. Suppose you are ordered to go and move a car—you are ordered to do that—and you go and find it in no condition whatever to move, is it your duty to move that car?

A. That car was not unmovable.

Q. Answer the general question. Is it your duty under such circumstances to move that car?

A. If it ain't moveable I would certainly not move it.

Q. Well, if it is dangerous to life to move it, is it your duty to do it, do you think?

A. This was not dangerous to life.

19 The COURT. You are not asked as to that car. Now assume that it would be dangerous to move some car, would it still be your duty to attempt to make the coupling?

A. No.

Q. It would not be dangerous to life, you say—would it be dangerous to life?

A. No, sir; I did not say it was not.

Q. A man's life would not be sacrificed, then, by going in there under any circumstances to make this coupling?

A. Sir?

Q. Men loose their lives in doing that thing?

A. Men loose their lives right along over the same thing.

Q. That is what I asked you and what I understand you to deny. I asked you if it was dangerous to life for a man to go in there?

A. I did not say this one was dangerous to life.

Q. I am not talking about that. But going in between cars to make this coupling with a pin is dangerous to life or limb?

A. It is.

Q. And you knew that fact?

A. I knew it.

Q. And yet you tried to do this thing three times?

A. Yes.

Q. The only force that was used against you, as I understand you, was that you were instructed by the conductor to perform, to go and turn this car on the turntable?

A. Yes, sir.

Q. No hurry about it and no worry about it?

A. No, sir.

Q. I will ask you if such a book as that was furnished to you when you became fireman, and when you were wiper, engine wiper, and fireman, and brakeman?

A. Yes, sir; it was furnished to me when I got examined for firing, and when I became brakeman. I agreed to those rules and studied them all the time.

Q. Now, here is one rule, "Employees are required to be conversant with and obey the rules and special instructions. If in doubt as to the meaning, they must apply to the proper authority for an explanation." You knew that was there?

A. Oh, yes.

Q. Five persons employed in any service on the trains are subject to the rules?

A. Oh, yes.

Q. Rule 59—the first one is No. 3, the next No. 5, and the next 59. No. 59. Great care must be exercised by all persons in coupling cars, inasmuch as the coupling on cars or engines cannot be uniform in style or strength, and they are liable to be broken from various causes, so as to render it dangerous to those engaged in making couplings; all employes are enjoined before coupling cars or engines to examine and to know the kind and condition of the drawhead, drawbars, links, coupling apparatus, and are forbidden to place in a train any car with a defective coupler until they shall have reported the condition to the conductor or yardmaster." You knew that was there and promised to obey it?

A. Yes, sir; those were the rules handed to me by the defendant company.

Q. Now, when you were ordered to go and make this coupling, did the conductor remain on his train?

A. The conductor was attending to part of his duties; he was unloading way freight.

Q. He was not with you and was not conversant with what you were doing?

A. Not just at that time.

Q. And there was nobody to give you any directions or to tell you what to do; after you got there and found this defective car, there was nobody there—the conductor, at least, was not there?

A. No, sir.

Q. So that you could ask what to do?

A. No, sir.

Q. The conductor did not know anything about it, so far as you knew, about the condition of that car?

A. No.

Redirect examination by Mr. MAGINNIS:

Q. You have been asked about this rule 59, Mr. Johnson. Calling your attention to it, why was it you did not report the condition or fact that this was a Miller hook and a Janney and the fact of that tipping to the conductor?

A. Well, it is a habit that every employee on the railroad service has, that if they find anything that is a little bit wrong and not so serious that they do not run right straight to the conductor, but they try and do their work and go on and not delay the traffic; that is the way that I have always been instructed. I have been so instructed by my superior officers, by a number of them, any one I have been working for. I have never been told to go to work and not report anything, but, as has been the habit with others, I have tried to go over the road the best way I could. If I had not gone in and tried to make the coupling, the car could have been moved by shoving it, but could not have been worked right in that way; it ought to be coupled to go on the turntable, and could not be coupled except by link and pin. It could not be done in any other way. The fact that one of the couplers was a Miller hook and the other a Janney would not be one of the defects that I would report under rule 59. The fact that one was a Miller and the other a Janney is not a defect, at all.

Q. Was there any apparent danger attached to the tipping of the Miller hook?

A. No; not any more than it would have been, but very little if it had been level. Of course, it made it more hard to couple;
21 it made it more hard because it made the link that much harder to enter into the Janney by being slightly tipped.

Q. Would it make it any more difficult to handle?

A. It made me pull on the Miller hook; pull it towards me, because it was eternally sliding by the place [in] was to enter; it had to come up towards me to go into the Janney.

Q. And that is the only difference to what it would have been if it had been in perfect order?

A. Yes; it would have stayed right there.

Cross-examination by Mr. MARSHALL:

Q. Mr. Johnson, you stated that you were instructed not in accordance with what is stated there, not to notice these small matters but to go ahead?

A. Why, I have not been instructed by my conductor to go in there between there; only to go ahead and do that work and couple that car; that is what I have been instructed.

He did not tell me how it was to be done. It was not practicable to move it on the turn table without coupling it. I had control of the engine by way of signals. I signaled the engineer and he obeyed my signals. I told him each time to move back and when to move and each of his movements was in accordance with my signals.

I stood there and tried three times—twice before the accident—to make this coupling.

I examined the coupling before I made the effort, found it slightly tipped, but it did not stop me from making the coupling.

Q. Did you examine to see whether, after seeing that it was slightly tipped to see whether a difficulty coupling to make before you undertook it, or did you go right in there and do it without an examination?

A. I did not run at a breakneck speed in there; not much. I took my time about it, and he was not coming back very swift, either.

He did not come back until I signalled him to come back.

I went in and saw the coupler, and saw just exactly how it ought to be made.

The Miller hook had not sagged; it tipped. I saw that it was tipped. After seeing the condition of things I signalled the engineer to move back his engine.

Q. He moved back and you failed to make the coupling that time?

A. I never made it.

Q. You did not make it?

A. No, sir; not then.

Q. You signalled the engineer to move his engine off a little, didn't you?

A. Yes, sir.

Q. You then took hold of the pin?

A. I did not take hold of the pin.

22 Q. What did you take hold of?

A. I pulled on the link towards me and the Miller hook towards me, and tried to enter the pin into the Janney.

Q. You took hold of the two——?

A. Not two of them.

Q. You took hold of the Miller hook and coupler?

A. Yes; I did not take hold of the Miller hook; I took hold of the link.

Q. Very well; the link. You took hold of the link?

A. Yes.

Q. Did you have hold of the pin also?

A. I had hold of the pin—the one that was loose—with my left hand; yes.

Q. You had the ring in your right hand, did you?

A. I did not have any ring at all; I had a link.

Q. You had the link in your right hand?

A. Yes, sir.

Q. And the pin in your left?

A. Yes, sir.

Q. And then you made a signal for him to come back the second time?

A. And as soon as I gave the signal I grabbed the link with my righ hand.

Q. And you gave the signal?

A. Yes, sir.

Q. And he moved at your order?

A. Yes, sir.

Q. You then failed to do it the second time; you say it was difficult?

A. Yes, sir.

Q. You knew it was dangerous?

A. Yes, sir.

Q. You then signal/ed for him to move his engine off again, so as to enable you to make it; and you then signal/ed him to come back, so you could make the connection?

A. Yes, sir.

Q. And then it was when you were hurt?

A. When I was caught between the bumpers; yes, sir.

Q. The conductor was off some distance attending to other business, was he not?

A. Yes; he was attending to his way billing.

Q. And merely told you to make the coupling?

A. Yes, sir.

Q. And you went up there with no superior in charge of or controlling you?

A. Not just then.

Q. And not just then in the control of the engineer?

A. No, sir.

Q. You yourself was master of the situation, were you?

A. Right then; yes, sir.

Re-direct by Mr. MAGINNIS:

The method I was pursuing at that time was the proper method. I put the link in the Miller hook in the first place, and then attempted to couple on the *the* engine as it backed up.

23 The cause of the tipping of the Miller hook was that the nuts holding the strap where the Miller hook slides was loose on the side away from me, which made the Miller hook tip down on that side, was not damaged enough to go to work and take the Miller hook off, but was enough to make it a difficult coupler.

T. F. ROWLAND, a witness produced by the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. MAGINNIS:

I am a train dispatcher of the Southern Pacific Company, and was last August at Ogden. Had charge of the directing of train movements, which is done, when they are out on the road, by telegraphic orders.

I know the dining car Del Monte. It is used on our road between San Francisco and Ogden. I do not know how long it has been used there; probably over four or five years. I do not know personally what kind of a coupler the car was equipped with.

Q. Mr. Rowland, I wish you would explain to the jury just exactly what the Janney coupler is, please.

A. Well, the Janney coupler—the only way I can explain it is the way it has been explained: Two knuckles that go together, and when they are coupled they are held together by a key which drops down into the knuckle, and when they go to uncouple they have to pull a lever or chain, which raises this key up from the knuckle and it uncouples.

Q. When the key is up will the cars couple by impact?

A. Well, the key stays down all the time.

Q. How do you fix it so that they will couple by impact?

A. Oh, they will couple by impact when it is down; generally the car raises the key and it falls itself.

Q. So that the impact raises the key and it falls itself?
A. Yes, sir.
Q. And then it drops and catches?
A. Yes, sir.
Q. Why is it that a Miller hook won't couple with a Janney?
A. Well, it is a different sort of a coupler and extends on the opposite side from which it should be.

I was not subpœnaed to bring here all the bulletin copies of telegraphic orders in regard to making up trains, and I have no orders in my office in regard to the Del Monte car on the 5th day of August.

I made no search for them, but I know of my own knowledge why the Del Monte car stopped at Promontory.

Q. Why was it?

24 A. Why, the train coming east was so late we could not get the car to Ogden in time to go back on the train that it was due to leave there on, and it was dropped off at Promontory to be picked up by the west-bound train.

The through passenger train to California. It was not absolutely necessary to turn it around. The dining-car conductor requested that it be turned around; "his idea in having it turned was so as to leave the main entrance next to the train."

Q. Turned in preparation of being picked up and put on the passenger train?
A. Yes, sir.
Q. Who was ordered to turn it around; do you know?
A. The conductor of a certain freight train.
Q. Do you remember the number of the train?
A. No; I do not remember the number of the freight train.
Q. Know the conductor's name?
A. Yes; I remember it.
Q. What was his name?
A. Mr. Sleeth.

I do not remember the number of the freight train and do not know whether it was a regular train or not.

Mr. Sleeth ran between Carlin and Ogden.

Q. And then his train run between Ogden and Carlin?
A. Why, yes, sir; he did not run through with the train; he changed crews and engines at Terrace and met No. 4.
Q. But the train itself was a through train running between San Francisco and Utah?
A. Yes, sir.

Cross-examination by Mr. MARSHALL:

Q. I believe you stated just now, on direct examination, that that diner need not be turned at all; was it ordered by you to be turned?
A. Yes, sir.
Q. So turned?
A. Yes, sir.
Q. Could it be moved with safety without turning it?
A. Yes, sir.
Q. Could it be moved without coupling by pushing it on to the turntable?

A That question I could not answer; I do not know just where the car stood in the yard.

Q. You could not state that?

A. No, sir.

Q. Mr. Rowland, the Miller hook is itself an automatic coupler, is it not, when in connection with another Miller?

A. Yes, sir.

Q. And the Janney coupler is an automatic coupler of itself?

A. Yes, sir.

Q. Both, then, are in themselves automatic couplers?

A. Yes, sir.

Q. But they can not be used as automatic couplers together?

25 A. No, sir.

Q. I believe that is what you mean?

A. Yes, sir.

Q. There was the Miller automatic coupler on the dining car?

A. Yes, sir.

Q. And there was a Janney automatic coupler on the tender of the engine or on the engine?

A. Yes, sir.

Q. I understand, Mr. Rowland, that that diner was not in service at the time; it was standing there where it had been left, was it not?

A. Yes, sir.

Q. Waiting to be turned merely and thereafter to be moved on some train going west?

A. Yes, sir.

Q. It was left then by the train that was coming east?

A. Yes, sir.

Q. Originally?

A. Yes, sir.

Q. And was dropped in the yard at Promontory?

A. Yes, sir.

Q. That was the morning train that left it?

A. Yes, sir.

Q. It was to be taken up in the evening train, five o'clock in the afternoon, was it not—a train going west; it was to be picked up at Promontory by that train?

A. Yes, sir; picked up.

Q. And this train on which Johnson was, was a freight train coming east?

A. Yes, sir.

Q. And it was taken advantage of for the purpose of merely turning this diner on the turn table?

A. Yes, sir.

Q. So as to have the kitchen in the rear instead of the front?

A. Yes, sir.

Q. And that was the only object?

A. Of throwing it around; yes, sir.

Q. It was not then on duty, the dining car was not?

A. No.

Q Not in service?
A. No.
Q. It was at the yard at Promontory?
A. Yes, sir.

Redirect examination by Mr. MAGINNIS:

They were getting it ready to go out on the five or six o'clock train No. 5, and turning it around was part of getting it ready for that train.

Q. (By Mr. MARSHALL): It had to be left there and to be turned around and to be picked up by the five o'clock train?

A. Yes, sir.

I could not name the different hooks in use on the Southern Pacific in August, 1900; there were forty or fifty or a hundred different styles of couplers that have been used, and most of them were being used at that time.

26 Q. Would all of there couplers, or what of these couplers you spoke of, 40 or fifty couplers aside from the Miller, couple with the Miller automatically?

A. No, sir.

Q. Would they couple with themselves automatically?

Well, if you changed the coupler it would be a different coupler—if you changed the knuckle with different couplers to make them couple with the Miller or couple with the Janney.

Q. Which was the standard in 1900?

A. That is difficult to answer.

The main difference between the Miller hook and the Janney coupler is the direction in which the hook points.

A number of other kinds of couplers were used on the Southern Pacific. I can not say which was the standard as to the direction which they pointed, the Miller or the Janney; we were using both at that time. Not being familiar with the Master Mechanic or Car Builders' rules at that time I could not answer; I do not know which was the standard coupler at that time.

I can not say which was in the majority as to the way in which they pointed.

Examination by the COURT:

Q. Do you know whether at that time or prior to that time, two years prior to that time, the railroad had been accustomed to use a coupler with a link in the yards, switching and under various circumstances?

A. Yes; they had. There was the Janney and the Miller, and there was several couplers used in that way.

Q. Coupled with links?

A. Yes, sir; but in all cases it was understood——

Q. Never mind what was understood. I mean the fact whether it had been used, the link; had it been used frequently or not for the two years prior to the 5th day of August, 1900?

A. Yes, sir.

Adjourned to Saturday, June 29, 1901.

S. C. SLAUGHTER, a witness produced by plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. MAGINNIS:

I live at Ogden, am a switchman by occupation on the Southern Pacific. Have been engaged with that company about three years, in Ogden yard and Terrace as well. I was engaged prior to the 6th day of August last in the Ogden yard, handling cars in the employ of the Southern Pacific Company.

27 We used to handle the dining car Del Monte quite often in the yard there.

I can't give you no certain date; we did not have the car every day; this car that went west and came back. I could not say when I [say] the car prior to the 5th of August.

I saw in the papers that Johnson lost a hand and I heard of it about the time of the accident. I had seen the car shortly before that time. Cannot fix the date.

To explain the matter there was several of us switchmen who took turn about doing this passenger work, every two weeks about. I don't know whether it had been over three days or the first day on the three weeks or not or whether it was the last end of it; we were switching two weeks apart about.

They did not double the dining cars back into Ogden at that time; I would not be positive but I think they were in Ogden every three days. I mean at the time of the accident. Now the car comes in on No. 6 in the morning and goes back on No. 5, at 11.15, and be there at 5.45, and goes back at 10.45.

In handling the passenger trains we had two weeks on and two off, and that car would come in every three days unless something happened to it, like shopping it, and holding it down below and substituting another car.

I cannot say when I saw it before the time of the accident. It might have been cut out and not been on the line may be two weeks and may be a month; they would often run diners up that did not belong on this end at all.

The coupling apparatus on this car was permanent, not something that was changed frequently, but you can remove this knuckle in case you break a knuckle out of it.

I could not state whether or not we handled that car in July, last year; I may have handled and may not have handled it; we handle the Southern Pacific cars, and often handle dining cars but never pay much attention to it.

No, my attention had never been called to it by any person, we made several remarks about it when coupling on it among the switchmen ourselves. I had noticed its condition. It was not the principal one, the other ones, too, as well as that one.

(This question is misplaced; belongs on page 15 at place marked "X.")

Q. Mr. Slaughter, I will ask you, prior to this, state what kind of a coupler was that car equipped with, and up to the time of the accident.

(Objected to because the foundation was not laid and this witness has particularly stated that he knew nothing about it immediately prior to the accident.

Objection sustained. To which ruling the plaintiff then and there excepted.)

28 We could handle the other dining cars a little easier than we could on that one.

I could not say when it was; I might be wrong about it. Very frequently speak about them; every time you get a car you can't couple easy we have a little consultation among ourselves.

I was working in the Ogden yards at the time of the accident.

I went to work in the Ogden yards when I came from Terrace; possibly two or three months before the accident.

And during that two or three months, every other two weeks I handled the dining cars in the passenger trains.

Q. And during these two or three weeks it was customary for these dining cars to be in once in three days?

A. Yes. I cannot say when I first noticed it.

Q. Or about when?

A. I could not say on that until they called attention to it, had a coupling on it, I would not pay any attention to it; think about something else; very frequently have a car with a coupler on it, and pass them up—I say very frequently have cars with a coupler on it that is not altogether proper' equipped, but we never pay any attention to that; we do our work.

Q. Can you state, Mr. Slaughter, about how often you noticed it, if you noticed it more than once?

A. If I had known how many trips the dining car had made between Ogden and Sacramento—but then the car might have been cut out, may have been held out a trip or two.

Very frequently hold out a car, put it in the shop at Sacramento and substitute another car.

Cars equipped just the same as the Del Monte.

I cannot state how often I noticed this particular car. I have coupled on the car myself.

I have noticed it, yes. I could not say how many times I noticed it; I know I have coupled on to the car.

I could not state (how many times coupled it); I would not state because I can't positively say how many times I did notice it.

Not four or five times.

I have coupled it a number of times.

I have coupled this particular car "may be half a dozen times."

The carrying iron, the iron used to hold up the draw bar was a little low on one side when we came to couple on to it. I think it was (low) on the left the way we were working with the car, it would be tilted in this way.

I noticed it (in this condition) about six times, I believe.

I did not notice any change in it; the draw head disappeared from the car is all I know; that had been removed.

The last time I handled that car (before the accident to Johnson) it was in the same condition.

29 Q. About how long before the accident was that?

A. I could not say; it might have been in the freight yards; I was not switching the passenger cars then at the time the accident occurred.

Q. What would be the limit, a week, two or three weeks?

A. Two weeks, yes; they would change every two weeks.

Q. So that probably the last time, it was along about two weeks, as I understand you?

A. Yes, sir.

Cross-examination by Mr. MARSHALL:

I am now in the companies' employ, a switchman at Ogden, where I was at the time of the accident.

Every two weeks we were changed from the freight yards to passenger. I could not say whether I was engaged in the passenger yards in August or not. I was engaged in the yard when Mr. Johnson was hurt, but would not say I was engaged at the passenger depot.

Q. I ask you if you were engaged there where the diners are?

A. All connected with them; we have separate places, but all connected in one yard, but separate parts.

I could not say whether I was in the freight or passenger work.

I know whether I was in the yards at all or not. I was in the yards.

I could not state whether I was in the passenger yards at the time Mr. Johnson got hurt or not.

I think I can identify other cars that were in the yards that I handled immediately prior to the fifth of August.

I was not handling any diners at the time Johnson got hurt.

Q. I say within two weeks; name some other diner that you were handling.

A. I suppose I can.

Q. Well, name the other diners that you handled.

A. I think the Southerland was in the service.

Q. Do you remember the condition of the coupler on the Southerland at that time?

A. No, sir; I do not.

Q. Do you remember the name of some other diner that you handled?

A. I think the Muscatel.

Q. Did you notice the couplers of that within two or three weeks prior to August fifth, 1900?

A. No; I think not; I never had any trouble to couple on that one.

I think the Zinfandel, another one in the service then.

We did not have any trouble coupling on to the other diners.

My attention was particularly called to the Del Monte because it was a different drawhead altogether.

I did not notice as to the irons that held up any of these other
30 drawheads; no necessity; automatic coupler, and you just have to couple on, and this other diner you have to use a link and pin and hook.

I did not notice those as to what condition they were in; only noticed the Del Monte.

What called my attention to it, it was a little hard to couple on to.

The iron that supported the rod was lower on one side.

(In the Miller hook) There is a small pin there to enter the link in case you have no corresponding one with it; you use a link and pin, and if you enter it on a curve or a straight track it is difficult to couple on;

may get the pin in the knuckle and may not, and may have to lift the drawhead up to enter the line.

I can't tell when I noticed this on the Del Monte; I think about two weeks; maybe three weeks.

I am positive I noticed that condition of things about two weeks prior to the accident.

I will not say that the Del Monte was in that yard exactly two weeks.

I said we would change every two weeks; I might have handled it, and that the car might have been cut out and not on the run.

I can't make any positive dates when I did handle it.

I can not say whether two weeks or three weeks that diner was in the yard at Ogden; I don't know but that it was held over at Sacramento.

I could not say; I never paid any attention to it. It might have been in the yard or maybe not.

I say that is my judgment; I think it is about every two weeks I saw the car.

It might have been two weeks and it might have been three (when I last saw that car and noticed its coupling) I don't say whether in there in two weeks, right on the spot.

I can't tell; the car might have been cut out, but I say we were changed on this work every two weeks.

This coupler would couple with a Miller hook, and this tipping would not have affected that at all. If the engine had been equipped with a Miller hook it would not have been affected at all.

W. O. JOHNSON, plaintiff, being recalled as a witness in his own behalf, testified as follows:

Direct examination by Mr. MAGINNIS:

Q. Mr. Johnson, why did you not report it (the lowering or tipping of the Miller hook)?

A. Why, in the first place there was—when I got my orders
31 from my conductor to go in on the car we did not have but very little time ahead of No. 2, and in the other place there was no repair shop at Promontory, and it was not hardly enough to make any particular notice of it. That was why I did not report it.

(No cross-examination.)

And thereupon said plaintiff rested his case. And the above and foregoing was all the evidence introduced herein.

Whereupon said defendant moved the court to peremptorily instruct the jury to return a verdict in its favor for the reason that plaintiff has failed to make out a case upon his own evidence and because the evidence shows that the defendant is entitled to such an instruction for a verdict in its favor.

And the court having heard the arguments of counsel and being well advised in the premises, doth sustain said motion.

And thereupon the court instructed the jury as follows:

Gentlemen of the jury, the court will relieve you of any further consideration of this case and of all responsibility as to a verdict, and instruct you to find a verdict for the defendant. One of your number may sign the verdict without leaving the box.

To the giving of which instruction plaintiff then and there excepted for the reason that the evidence introduced is sufficient to justify the submission of the case to the jury.

Whereupon said jury without leaving their seats, returned a verdict finding the issues joined in favor of the defendant, upon which judgment was duly entered that defendant go hence without day and recover its costs.

And for as much as the matters and things above set forth do not appear fully of record in this action, said plaintiff tenders this his bill of exceptions by him reserved on the trial of this action, and prays that the same may be settled, allowed and signed by the judge of this court and made a part of the record of this case, which is now done accordingly on this 16th day of September, 1901. Signed and sealed in open court.

JOHN A. MARSHALL,
Judge of circuit court of the United States for the district of Utah.

388. Service of a copy of this proposed bill of exceptions is hereby acknowledged on this 31 day of August, 1901. Marshall Royal & Hempstead, attorneys for defendant. Deposited in clerk's office, August 31, 1901. Jerrold R. Letcher, clerk.

32 *Petition for writ of error.*

And afterwards and on the 16th day of December, 1901, plaintiff filed his petition for writ of error, which being entitled in this court and cause, is in words and figures following, to wit:

And now comes W. O. Johnson, plaintiff herein, and says that on or about the 28th day of June, 1901, this court entered judgment herein in favor of the defendant, and against this plaintiff, in which judgment and proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the eighth judicial circuit, for the correction of errors so complained of and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to said circuit court of appeals.

W. L. MAGINNIS,
Attorney for Plaintiff.

Filed December 16, 1901. Jerrold R. Letcher, clerk.

Assignment of errors.

And afterwards and on the same day, plaintiff filed his assignment of errors, which, being entitled in this court and cause, is in words and figures following, to wit:

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to wit:

(1) The court erred in instructing the jury to find a verdict for the defendant.

(2) The court erred in overruling the motion of plaintiff for a new trial.
(3) The court erred in entering judgment in favor of the defendant and against the plaintiff.

W. L. MAGINNIS,
Attorney for Plaintiff.

Filed December 16, 1901. Jerrold R. Letcher, clerk.

Order allowing writ of error.

And afterwards and on the same day, an order was made by the judge of this court, which, being entitled in this court and cause, is in words and figures following, to wit:

33 This 16th day of December, A. D. 1901, came the plaintiff by his attorney, and filed herein and presented to the court his petition praying for the allowance of a writ of error intended to be urged by him, and praying also that a transcript of the record and proceedings and papers upon which judgment herein was rendered, [duth] authenticated, may be sent to the United States circuit court of appeals for the eighth judicial circuit, and that such other and further proceeding may be had as may be proper in the premises.

On consideration whereof the court does allow the writ of error upon the plaintiff giving bond according to law in the sum of $300 dollars, which shall operate as a supersedeas bond.

J. A. MARSHALL,
District judge.

Filed December 16, 1901. Jerrold R. Fletcher, clerk.

Bond on appeal.

And afterwards and on the same day, plaintiff filed his bond on appeal on writ of error, which being entitled in this court and cause, is in words and figures following, to wit:

Know all men by these presents, that we, W. O. Johnson, as principal, and Peter Nordquist and P. A. Nordquist, as sureties, are held and firmly bound unto the defendant, Southern Pacific Company, in the full and just sum of three hundred dollars to be paid to the said defendant, Southern Pacific Company, its certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this 10th day of December, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a circuit court of the United States for the district of Utah, in a suit pending in said court between W. O. Johnson, plaintiff, and Southern Pacific Company, defendant, a judgment was rendered against the said W. O. Johnson, and the said W. O. Johnson having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Southern Pacific Company citing and admonishing it to be and appear at a session of the United States circuit court of

appeals for the eighth judicial circuit, to be holden at the city of St. Paul, in said circuit, on the —— day of May, 1902.

34 Now the condition of the above obligation is such that if the said W. O. Johnson shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Signed, sealed, and delivered in the presence of—
THO. MALONEY.

W. O. JOHNSON, [SEAL.]
PETER NORDQUIST, [SEAL.]
P. A. NORDQUIST. [SEAL.]

Approved by
JOHN A. MARSHALL,
District Judge.

STATE OF UTAH,
County of Weber, ss:

Peter Nordquist and P. A. Nordquist, being each first severally duly sworn, according to law, on oath depose and say: That he is a resident and freeholder of the above-named county and State, and is worth the sum specified in the foregoing undertaking over and above all his just debts and liabilities, exclusive of property exempt from execution.

PETER NORDQUIST.
P. A. NORDQUIST.

Subscribed and sworn to before me this 10th day of December, 1901.
[SEAL.] THO. MALONEY,
Notary Public.

My commission expires April 22nd, 1902.

Bond filed December 16, 1901. Jerrold R. Letcher, clerk.

In the United States circuit court for the district of Utah.

Certificate.

I, Jerrold R. Letcher, clerk of the United States circuit court for the district of Utah, do hereby certify that the foregoing pages numbered from one to 50, inclusive, contain a full, true, and complete transcript of all the pleadings, proceedings, and record entries (except praecipe and order setting cause for trial June 28, 1901, 2 subpoenas, notice motion new trial, plaintiff's affidavit as to service bill exceptions, order allowing plaintiff file petition new trial, petition new trial nunc pro tunc August 5, order amending order of September 2, order entered re plaintiff's motion new trial argued and submitted, and order denying

35 same) in a certain cause adjudicated in said court wherein W. O. Johnson was plaintiff and Southern Pacific Company, a corporation, was defendant, as full, true, and complete as the originals of the same now remain on file and of record in my office.

I further certify that the original writ of error and the original citation are hereto attached and herewith returned with the transcript of the record in said cause.

In testimony whereof, I affix my official signature and the seal of said court, at Salt Lake City, in said district on this 10th day of February, A. D. 1902, and of the Independence of the United States of America, the 126th year.

[United States circuit court, district of Utah.] JERROLD R. LETCHER, *Clerk.*

Filed Feb. 20, 1902. John D. Jordan, clerk.

Writ of error.

UNITED STATES OF AMERICA, ss:

The President of the United States of America, to the honorable judges of the United States circuit court for the district of Utah, greeting:

Because, in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court for the district of Utah, before you, at the May term, 1901, thereof, between W. O. Johnson, plaintiff, and Southern Pacific Company, defendant, a manifest error hath happened to the great damage of the said W. O. Johnson, plaintiff, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals, for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 15th day of February, A. D. 1902, to the end that the record and proceedings aforesaid being inspected, the United States circuit court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

36 Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of December, in the year of our Lord one thousand nine hundred and one.

Issued at office in Salt Lake City, Utah, with the seal of the United States circuit court for the district of Utah, and dated as aforesaid.

[United States circuit court, district of Utah.] JERROLD R. LETCHER,
Clerk of the United States Circuit Court for the District of Utah.

Allowed by

United States District Judge.

UNITED STATES OF AMERICA,
District of Utah, ss:

In obedience to the command of the within writ, I herewith transmit to the United States circuit court of appeals a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the United States circuit court for the district of Utah.

[United States circuit court, district of Utah.] JERROLD R. LETCHER.
Clerk of United States Circuit Court.

Filed Feb. 20, 1902. John D. Jordan, clerk.

Citation.

United States of America, to Southern Pacific Company, greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court for the district of Utah, wherein W. O. Johnson is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

37 Witness, the honorable John A. Marshall, judge of the United States district court for the district of Utah, and presiding in the United States circuit court for said district of Utah, on this 16th day of December, 1901.

J. A. MARSHALL, *Judge.*

Service of above admitted this 18th day of December, 1901.

THOMAS MARSHALL,
Atty. for S. P. R. R. Co.

Lodged in clerk's office Dec. 18, 1901.

JERROLD R. LETCHER, *Clerk.*

Filed Feb. 20, 1902. John D. Jordan, clerk.

38 (Appearance for plaintiff in error.)

And on the twenty-second day of February, A. D. 1902, an appearance of counsel for plaintiff in error was filed in the clerk's office of said circuit court of appeals in said cause in words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 1722.

The clerk will enter my appearance as counsel for the plaintiff in error.

W. L. MAGINNIS.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1722. W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company. Appearance. Filed Feb. 22, 1902. John D. Jordan, clerk. W. L. Maginnis, counsel for plff. in error.

(Appearance for defendant in error.)

And on the twentieth day of February, A. D. 1902, an appearance of Mr. Martin L. Clardy as counsel for the defendant in error was filed in the clerk's office of said circuit court of appeals in said cause in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit.

W. O. JOHNSON, PLTFF. IN ERROR,
vs.
SOUTHERN PACIFIC COMPANY, DEFT. IN ERROR. } No. 1722.

The clerk will enter my appearance as counsel for the deft. in error.

MARTIN L. CLARDY.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. No. 1722. W. O. Johnson, P. E., vs. Southern Pacific Co., D. E. Appearance. Filed Feb. 20, 1901, John D. Jordan, clerk. Martin L. Clardy, counsel for deft. in error.

39

(Appearance for defendant in error.)

And on the thirty-first day of May, A. D. 1902, there was filed in the clerk's office of said circuit court of appeals, in said cause, an appearance of Mr. Henry G. Herbel for defendant in error, in words and figures following, to wit:

United States circuit court of appeals, eighth circuit, May term, 1902.

W. O. JOHNSON
vs.
SOUTHERN PACIFIC COMPANY, DEFT. IN ERROR. } No. 1722.

The clerk will enter my appearance as counsel for the deft. in error.

HENRY G. HERBEL.

(Endorsed:) U. S. circuit court of appeals, eighth circuit. May term, 1902. No. 1722. Johnson vs. So. Pac. Co. Appearance. Filed May 31, 1902. John D. Jordan, clerk. Henry G. Herbel, counsel for deft. in error.

Order of submission.

And on the third day of June, A. D. 1902, in the record of the proceedings of said circuit court of appeals is an order of submission in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit, May term, 1902.

TUESDAY, *June 3, 1902.*

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 1722.

In error to the circuit court of the United States for the district of Utah.

40 This cause having been called for hearing in its regular order, argument was commenced by Mr. W. L. Maginnis for plaintiff

in error, continued by Mr. Henry G. Herbel for defendant in error, and concluded by Mr. W. L. Maginnis for plaintiff in error. Thereupon this cause was submitted to the court on the transcript of record from said circuit court and the briefs of counsel filed herein.

OPINION.

And on the twenty-eighth day of August, A. D. 1902, an opinion of said United States circuit court of appeals was filed in said cause, in words and figures following, to wit:

41 United States circuit court of appeals, eighth circuit.

No. 1722. May term, A. D. 1902.

W. O. JOHNSON, PLAINTIFF IN ERROR, vs. SOUTHERN PACIFIC COMPANY, DEFENDANT in error.	In error to the circuit court of the United States for the district of Utah.

Mr. W. L. Maginnis for plaintiff in error.

Mr. Henry G. Herbel (Mr. Martin L. Clardy was with him on the brief) for defendant in error.

Before Sanborn and Thayer, circuit judges, and Lochren, district judge.

Syllabus.

1. Automatic couplers—Act of March 2, 1893, does not require locomotives to be equipped with.

The act of March 2, 1893 (27 Stat., c. 196, p. 531), does not make it unlawful for common carriers to use locomotives engaged in interstate commerce which are not equipped with automatic couplers.

2. Construction of statutes—Act changing common law strictly construed.

A statute changing the common law modifies or abrogates it no farther than the clear import of its language necessarily requires.

3. Construction of statutes—Penal statute strictly construed.

A penal statute may not be so broadened by construction as to make it cover and authorize the punishment of otherwise lawful acts which are not denounced by the usual meaning of its express terms.

42 4. Construction of statutes—Enumeration of subjects excludes others.

A statute which enumerates the parties, things, or acts which it denounces thereby impliedly excludes all others from its effect.

5. Construction of statutes—When not permissible.

When the language of a statute is unambiguous and its meaning is plain, it must be held to mean and the legislative body must be held to have intended what it plainly expresses, and no room is left for construction.

6. Negligence—Assumption of risk.

A servant assumes the ordinary risks and dangers of the employment upon which he enters, so far as they are known to him, and so far as

they would have been known to one of his experience, age, and capacity by the use of ordinary care.

7. Negligence—Assumption of risk of coupling cars with different couplers.

A brakeman of ordinary intelligence and experience assumes the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, and deadwoods, because these are the ordinary risks and dangers of his service.

8. Automatic couplers—Act of March 2, 1893—Equipment of car with one kind of coupler sufficient.

The equipment under the act of March 2, 1893, of a car with automatic couplers which will couple automatically with those of the same kind or make is a compliance with the statute. It does not require cars used in interstate commerce to be equipped with couplers which will couple automatically with cars equipped with automatic couplers of other makes.

9. Act of March 2, 1893—When car is used in moving interstate traffic.

Cars loaded with articles shipped to other States and started, whether in yards, on side tracks, or in trains, are used in moving interstate traffic. But vacant cars in yards, on side tracks, in repair shops, or in trains which are not loaded with, or in use to move, articles of interstate commerce do not fall within the terms or meaning of the act of March 2, 1893.

A dining car standing empty on a side track at an intermediate station where it had been left by a train engaged in interstate traffic until it should be taken by another train engaged in the same traffic going in the opposite direction, and which the owner intended to use in interstate traffic, was drawn by a freight engine from the side track to the turntable, turned, and placed again upon the side track.

Held, That the car was not used in moving interstate traffic while it was on the side track and while it was being turned.

43 STATEMENT.

This is an action for damages for a personal injury in which the court instructed the jury to return a verdict for the defendant upon this state of facts: The defendant was operating passenger trains between San Francisco, in the State of California, and Ogden, in the State of Utah. It was in the habit of drawing a dining car in these trains. Such a car formed a part of a train leaving San Francisco and ran through to Ogden, where it was ordinarily turned and put into a train going west to San Francisco. On August 5, 1900, the east-bound train was so late that it was not practicable to get the dining car into Ogden in time to place it in the next west-bound train, and it was therefore left on a side track at Promontory, in the State of Utah, to be picked up by the west-bound train when it arrived. While it was standing on this track the conductor of a freight train, which arrived there, was directed to take this dining car to a turntable, turn it, and place it back upon the side track, so that it would be ready to return to San Francisco. The conductor instructed his crew to carry out this direction. The plaintiff, Johnson, was the

head brakeman, and he undertook to couple the engine to the dining car for the purpose of carrying out the order of the conductor. The freight engine was equipped with a Janney coupler, which would couple automatically with another Janney coupler and the dining car was provided with a Miller hook or Miller coupler, which would couple automatically with another Miller hook, but the Miller hook would not couple automatically with the Janney coupler, because it was on the same side and would pass over it. Johnson knew this and undertook to make the coupling by means of a link and pin. He knew that it was a difficult coupling to make and that it was necessary to go between the engine and the car to accomplish it, and that it was dangerous to do so. Nevertheless he went in between the engine and the car and tried to make the coupling three times without objection or protest. He failed twice, and the third time his hand was caught and crushed so that it became necessary to amputate his arm above the wrist.

Sanborn, circuit judge, after stating the case as above, delivered the opinion of the court.

Under the common law the plaintiff assumed the risks and dangers of the coupling which he endeavored to make, and for that reason he is estopped from recovering the damages which resulted from his undertaking. He was an intelligent and experienced brakeman, familiar with the couplers he sought to join and with their condition, and well aware of the difficulty and danger of his undertaking, so that he falls far within the familiar rules that the servant assumes the ordinary risks and dangers of the employment upon which he enters so far as they are known to him, and so far as they would have been known to one of his age, experience, and capacity by the use of ordinary care, and that the risks and dangers of coupling cars provided with different kinds of well-known couplers, bumpers, brakeheads, and deadwoods are the ordinary
44 risks and dangers of a brakeman's service. Bohn Mfg. Co. v. Erickson, 55 Fed. 943, 946, 5 C. C. A. 341, 343; Northern Pac. R. Co. v. Blake, 27 U. S. App. 190, 194, 11 C. C. A. 93, 95, 63 Fed. 45, 47; King v. Morgan, 48 C. C. A. 507, 511, 109 Fed. 446, 450; Moon-Anchor Consol. Gold Mines v. Hopkins, 111 Fed. 298, 304, 49 C. C. A. 347, 353; Railroad Co. v. McDade, 135 U. S. 554, 570; Southern Pac. Co. v. Seley, 152 U. S. 145, 152; Kohn v. McNulta, 147 U. S. 238, 241; Railroad Co. v. Voight, 176 U. S. 498; Sweeney v. Envelope Co., 101 N. Y. 520; Michigan Central Ry. Co. v. Smithson, 15 Mich. 212; Hodges v. Kimball, 44 C. C. A. 193, 104 Fed. 745; Whitcomb v. Standard Oil Co., (Ind) 55 N. E. 440, 442; Boland v. Louisville & N. R. Co., 18 Southern 99.

This proposition is not seriously challenged, but counsel base their claim for a reversal of the judgment below upon the position that the plaintiff was relieved of this assumption of risk and of its consequences by the provisions of the act of Congress of March 2, 1893 (27 Stat., c. 196, p. 531). The title of that act and the parts of it that are material to the consideration of this contention are these:

"An act to promote the safety of employes and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes."

"Sec. 1. That from and after the first day of January, 1898, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving-wheel brake and appliances for operating the train-brake system." * * *

"Sec. 2. That on and after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act shall be liable to a penalty of one hundred dollars for each and every such violation." * * *

"Sec. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provisions of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

The first thought that suggests itself to the mind upon a perusal of this law and a comparison of it with the facts of this case is that this statute has no application here because both the dining car and the engine were equipped as this act directs. The car was equipped with Miller couplers which would couple automatically with couplers of the same construction upon cars in the train in which it was used to carry on interstate commerce, and the engine was equipped with a power driving
45 wheel brake such as this statute prescribes. To overcome this difficulty, counsel for the plaintiff persuasively argues that this is a remedial statute; that laws for the prevention of fraud, the suppression of a public wrong, and the bestowal of a public good are remedial in their nature and should be liberally construed to prevent the mischief and to advance the remedy, notwithstanding the fact that they may impose a penalty for their violation, and that this statute should be so construed as to forbid the use of a locomotive, as well as a car, which is not equipped with an automatic coupler. In support of this contention he cites Sutherland on Statutory Construction, § 360, Wall v. Platt, 169 Mass., 398; Taylor v. United States, 3 How., 197, and other cases of like character. The general propositions which counsel quote may be found in the opinions in these cases, and in some of them they were applied to the particular facts which those actions presented. But the interpolation in this act of Congress by construction of an ex post facto provision that it is, and ever since January 1, 1898, has been, unlawful for any common carrier to use any engine in interstate traffic that is or was not equipped with couplers coupling automatically, and that any carrier that has used or shall use an engine not so equipped has been and shall be liable to a penalty of $100 for every violation of this provision is too abhorrent to the sense of justice and fairness, too rank and radical a piece of judicial legislation, and in violation of too many established

and salutary rules of construction to commend itself to the judicial reason or conscience.

The primary rule for the interpretation of a statute or a contract is to ascertain, if possible, and enforce the intention which the legislative body that enacted the law, or the parties who made the agreement, have expressed therein. But it is the intention expressed in the law or contract, and that only, that the courts may give effect. They can not lawfully assume or presume secret purposes that are not indicated or expressed by the statute itself and then enact provisions to accomplish these supposed intentions. While ambiguous terms and doubtful expressions may be interpreted to carry out the intention of a legislative body which a statute fairly evidences, a secret intention cannot be interpreted into a statute which is plain and unambiguous and which does not express it. The legal presumption is that the legislative body expressed its intention, that it intended what it expressed, and that it intended nothing more. United States v. Wiltberger, 5 Wheaton, 76; Union Central Life Ins. Co. v. Champlin, 116 Fed., 858; Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed., 77, 81; Railway Co. v. Bagley, 60 Kan., 424, 431; Woolsey v. Ryan, 59 Kan., 601; Davie v. Mining Co., 93 Mich., 491; Vogel v. Pekoe, 157 Ill., 339; Campbell v. Lambert, 36 La. Ann., 35; Turnpike Co. v. Coy, 13 Oh. St., 84; Stensgaard v. Smith, 43 Minn., 11.

Construction and interpretation have no place or office where the terms of a statute are clear and certain and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment. When the language of a statute is unambiguous and its meaning evident, it must be held to mean what it plainly expresses and no room is left for
46 construction. Swarts, trustee, v. Siegel, Fed. ; Knox County v. Morton, 15 C. C. A., 671, 673, 68 Fed., 787, 789; St. Paul, M. & M. Ry. Co. v. Sage, 17 C. C. A., 558, 565, 71 Fed., 40, 47; U. S. v. Fisher, 2 Cranch, 358, 399; Railway Co. v. Phelps, 137 U. S., 528, 536.

This statute clearly prohibits the use of any engine in moving interstate commerce not equipped with a power driving-wheel brake, and the use of any car not equipped with automatic couplers, under a penalty of one hundred dollars for each offense, and it just as plainly omits to forbid under that or any penalty the use of any car which is not equipped with a power driving-wheel brake and the use of any engine that is not equipped with automatic couplers. This striking omission to express any intention to prohibit the use of engines unequipped with automatic couplers raises the legal presumption that no such intention existed, and prohibits the courts from importing such a purpose into the act and enacting provisions to give it effect.

The familiar rule that the expression of one thing is the exclusion of others points to the same conclusion. Section 2 of the act does not declare that it shall be unlawful to use any engine or car not equipped with automatic couplers, but that it shall be unlawful only to use any car lacking this equipment. This clear and concise definition of the unlawful act is a cogent and persuasive argument against the contention that the use without couplers of locomotives, hand cars, or other means of conducting inter-state traffic was made a misdemeanor by this act.

Where the statute enumerates the persons, things, or acts affected by it, there is an implied exclusion of all others. (Sutherland on Statutory Construction, § 227.) And when the title of this statute and its first section are again read, when it is perceived that it was not from inattention, thoughtlessness, or forgetfulness, that it was not because locomotives were overlooked or out of mind, but that it was advisedly and after careful consideration of the equipment which they should have that Congress forbade the use of cars alone without automatic couplers—when it is seen that the title of the act is to compel common carriers to "equip their cars with automatic couplers * * * and their locomotives with driving-wheel brakes," that the first section makes it unlawful to use locomotives not equipped with such brakes and the second section declares it to be illegal to use cars without automatic couplers, the argument becomes unanswerable and conclusive.

Again, this act of Congress changes the common law. Before its enactment servants coupling cars used in interstate commerce without automatic couplers assumed the risk and danger of that employment, and carriers were not liable for injuries which their employés suffered in the discharge of this duty. Since its passage the employés no longer assume this risk, and if they are free from contributory negligence they may recover for the damages they sustain in this work. A statute which thus changes the common law must be strictly construed. The common or the general law is not further abrogated by such a statute than the clear import of its language necessarily requires. Shaw v. Railroad Co., 101 U. S., 557, 565; Fitzgerald v. Quann, 109 N. Y., 441, 445; Brown v. Barry, 3 Dallas, 365, 367. The language of this statute does not require the abrogation of the common law that the servant assumes the risk of coupling a locomotive without automatic couplers with a car which is provided with them.

47 Moreover, this is a penal statute, and it may not be so broadened by judicial construction as to make it cover and permit the punishment of an act which is not denounced by the fair import of its terms. The acts which this statute declares to be unlawful and for the commission of which it imposes a penalty were lawful before its enactment and their performance subjected to no penalty or liability. It makes that unlawful which was lawful before its passage and it imposes a penalty for its performance. Nor is this penalty a mere forfeiture for the benefit of the party aggrieved or injured. It is a penalty prescribed by the statute and recoverable by the Government. It is, therefore, under every definition of the term a penal statute. The act which lies at the foundation of this suit, the use of a locomotive which was not equipped with a Miller hook to turn a car which was duly equipped with automatic couplers, was therefore unlawful or lawful as it was or was not forbidden by this statute. That act has been done. When it was done, it was neither forbidden nor declared to be unlawful by the express terms of this law. There is no language in it which makes it unlawful to use in interstate commerce a locomotive engine which is not equipped with automatic couplers. The argument of counsel for the plaintiff is, however, that the statute should be construed to make this act unlawful because it falls within the mischief which Congress was seeking to remedy, and hence it should be presumed that the legislative body intended to

denounce this act as much as that which it forbade by the terms of the law. An ex post facto statute which would make such an innocent act a crime would be violative of the basic principles of Anglo-Saxon jurisprudence. An ex post facto construction which has the same effect is equally abhorrent to the sense of justice and of reason. The mischief at which a statute was leveled and the fact that other acts which it does not denounce are within the mischief and of equal atrocity with those which it forbids do not raise the presumption that the legislative body which enacted it had the intention, which the law does not express, to prohibit the performance of the acts which it does not forbid. Nor will they warrant a construction which imports into the statute such a prohibition. The intention of the legislature and the meaning of a penal statute must be found in the language actually used, interpreted according to its fair and usual meaning and not in the evils which it was intended to remedy nor in the assumed secret intention of the lawmakers to accomplish that which they did not express. United States v. Wiltberger, 5 Wheaton, 76; Sarlls v. United States, 152 U. S., 570; United States v. Harris, 177 U. S., 305, 309; Sutherland on Statutory Construction, § 208. The decision and opinion of the Supreme Court in United States v. Harris, 177 U. S., 305, 309, is persuasive, nay, it is decisive, in the case before us. The question there presented was analogous to that here in issue. It was whether Congress intended to include receivers managing a railroad among those who were prohibited from confining cattle, sheep, and other animals in cars more than 28 consecutive hours without unloading them for rest, water, and feeding under "An act to prevent cruelty to animals while in transit by railroad or other means of transportation," approved
48 March 3, 1873, and published in the Revised Statutes as sections 4386, 4387, 4388, and 4389. This statute forbids the confinement of stock in cars by any railroad company engaged in interstate commerce more than 28 consecutive hours, and prescribes a penalty of $500 for a violation of its provisions. The plain purpose of the act was to prohibit the confinement of stock while in transit for an unreasonable length of time. The confinement of cattle by receivers operating a railroad was as injurious as their confinement by a railroad company, and the argument for the United States was that as such acts committed by receivers were plainly within the mischief Congress was seeking to remedy, the conclusion should be that it intended to prohibit receivers, as well as railroad companies, from the commission of the forbidden acts, and hence that receivers were subject to the provisions of the law. The Supreme Court conceded that the confinement of stock in transit was within the mischief that Congress sought to remedy; but it held that, as the act did not by its terms forbid such acts when committed by receivers, it could not presume the intention of Congress to do so and import such a provision into the plain terms of the law. Mr. Justice Shiras, who delivered the unanimous opinion of the court, said: "Giving all proper force to the contention of the counsel for the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence

or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute." He cited with approval the decision of the Supreme Court in Sarlls v. United States (152 U. S., 570, 575) to the effect that lager beer was not included within the meaning of the term "spirituous liquors" in the penal statute found in section 2139 of the Revised Statutes, and closed the discussion with the following quotation from the opinion of Chief Justice Marshall in United States v. Wiltberger (5 Wheaton, 76):

"The rule that penal statutes are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legislative and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmakers must govern in the construction of penal as well as other statutes. But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal statutes are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be applied so as to narrow the words of the statute to the exclusion of cases
49 which those words, in their ordinary acceptation or in that sense in which the legislature ordinarily used them, would comprehend. The intention of the legislature is to be collected from the words they employ. Where there is no ambiguity in the words there is no room for construction. The case must be a strong one, indeed, which would justify a court in departing from the plain meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions so far as to punish a crime not enumerated in the statute because it is of equal atrocity or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule in other cases."

The act of March 2, 1893, is a penal statute and it changes the common law. It makes that unlawful which was innocent before its enactment and imposes a penalty recoverable by the Government. Its terms are plain and free from doubt and its meaning is clear. It declares that it is unlawful for a common carrier to use in interstate commerce a car which is not equipped with automatic couplers, and it omits to declare that it is illegal for a common carrier to use a locomotive that is not so equipped. As Congress expressed in this statute no intention to forbid the use of locomotives which were not provided with automatic couplers, the legal presumption is that it had no such intention, and provisions to import such an intention into the law and to effectuate it may not be lawfully enacted by judicial construction. The statute does not make it

unlawful to use locomotives that are not equipped with automatic couplers, in interstate commerce, and it did not modify the rule of the common law under which the plaintiff assumed the known risk of coupling such an engine to the dining car.

There are other considerations which lead to the same result. If we are in error in the conclusion already expressed, and if the word "car" in the second section of this statute means locomotive, still this case does not fall under the law, (1) because both the locomotive and the dining car were equipped with automatic couplers and (2) because at the time of the accident they were not "used in moving interstate traffic."

For the reasons which have been stated this statute may not be lawfully extended by judicial construction beyond the fair meaning of its language. There is nothing in it which requires a common carrier engaged in interstate commerce to have every car on its railroad equipped with the same kind of coupling, or which requires it to have every car equipped with a coupler which will couple automatically with every other coupler with which it may be brought into contact in the usual course of business upon a great trans-continental system of railroads. If the lawmakers had intended to require such an equipment it would have been easy for them to have said so, and the fact that they made no such requirement raises the legal presumption that they intended to make none. Nor is the reason for their omission to do so far to seek or difficult to perceive. There are several kinds or makes of practical and efficient automatic couplers. Some railroad companies use one kind, others have adopted other kinds. Couplers of each kind will couple automatically with others of the same kind or construction. But some couplers will not couple automatically with couplers of different construction. Railroad companies engaged in interstate commerce are required to haul over their roads cars equipped with all these couplers. They cannot relieve themselves from this obligation or renounce this public duty for the simple reason that their cars or locomotives are not equipped with automatic couplers which will couple with those with which the cars of other roads are provided and which will couple with equal facility with those of their kind. These facts and this situation were patent to the Congress when it enacted this statute. It must have known the impracticability of providing every car with as many different couplers as it might meet upon a great system of railroads, and it made no such requirement. It doubtless knew the monopoly it would create by requiring every railroad company to use the same coupler, and it did not create this monopoly. The prohibition of the statute goes no farther than to bar the handling of a car "not equipped with couplers coupling automatically by impact and which can be uncoupled without the necessity of men going between the ends of the car." It does not bar the handling and use of a car which will couple automatically with couplers of its kind because it will not also couple automatically with couplers of all kinds, and it would be an unwarrantable extension of the terms of this law to import into it a provision to this effect. A car equipped with practical and efficient automatic couplers such as the Janney couplers or the Miller hooks, which will couple automatically with those of their kind, fully and literally complies with the terms of the law, although these couplers will not couple automatically with automatic couplers of all

kinds or constructions. The dining car and the locomotive were both so equipped. Each was provided with an automatic coupler which would couple with those of its kind as provided by the statute although they would not couple with each other. Each was accordingly equipped as the statute directs, and the defendant was guilty of no violation of it by their use.

Again the statute declares it to be unlawful for a carrier "to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped," etc. It is not then unlawful under this statute for a carrier to haul a car not so equipped which is either used in intrastate traffic solely or which is not used in any traffic at all. It would be no violation of the statute for a carrier to haul an empty car not used to move any interstate traffic from one end of its railroad to the other. It would be no violation of the law for it to haul such a car in its yards, on its side track, to put it into its trains, to move it in any manner it chose. It is only when a car is "used in moving interstate traffic" that it becomes unlawful to haul it unless it is equipped as the statute prescribes. On the day of this accident the dining car in this case was standing empty on the side track. The defendant drew it to a turntable, turned it and placed it back upon the side track. The accident occurred
51 during the performance of this act. The car was vacant when it went to the turntable and vacant when it returned. It moved no traffic on its way. How could it be said to have been "used in moving interstate traffic" either while it was standing on the side track or while it was going to and returning from the turntable? If the defendant had drawn it vacant over every foot of its railroad it would not have been engaged in moving interstate traffic and it would not have fallen under the ban of the statute. How can it thus fall because it was moved in the same way over a small portion of the road? The argument of counsel for the plaintiff is that because it had been used in moving interstate traffic on its way from San Francisco to Promontory and because it was the intention of the defendant to put it to the same use in a few hours when a west-bound train arrived, it was impressed with the use of moving such traffic in the interim. But this statute must be read not only in the light of the rules of construction to which we have adverted in the earlier part of this opinion, but also in view of the limitations upon the power of Congress in this respect. It is by virtue of the power granted to Congress to "regulate commerce among the States" and by virtue of that authority alone that this statute was enacted and has efficacy. Congress had neither the authority nor the purpose to interfere with or to touch by this act anything except commerce among the States. Is the turning of a vacant car which its owner intends to use at some future time in moving interstate traffic any part of commerce among the States? Does the intention of the owner as to a future use of an implement of transportation affect the character of the act of turning this car? If the defendant had intended to use this dining car for traffic within the State of Utah only, if it had intended to send it to the shop to be destroyed or repaired, or if, after the car was turned, it had changed its intention and concluded that it would not use it to move interstate traffic, would any of these intentions or this change of purpose have affected the act of turning the car and have impressed it with a use in interstate

commerce or intrastate commerce? The only answer to these questions is a negative one, and if this be true, then the intention of the defendant to use this car at some future time in interstate commerce would not make the act of turning it a part of such commerce, nor bring it under the ban of the act of March 2, 1893. The opinion and decision of the Supreme Court in Coe v. Errol, 116 U. S., 517, 525, 526, lend strong support to this view. In that case the owners of logs were cutting and transporting them for the purpose of exporting them from New Hampshire to Maine. The logs had been cut, drawn to, and deposited in and on the banks of Clear Stream, to be floated down that stream and down the Androscoggin River to the State of Maine, and the owners intended to transport them in this way to that State. They were lying in the town of Errol awaiting water sufficient to float them down the stream. The Supreme Court held that they had not yet become subjects of interstate commerce; that they would not become such until they were "committed to the common carrier for transportation out of the State to the State of their destination or have started on
52 their ultimate passage to that State," and that the fact that their owners intended to export them could not change their situation, because the owners might change their intention. If commodities do not become articles of interstate commerce until they start on their final passage to another State, cars and engines can not be "used in moving interstate traffic" until they receive articles of interstate traffic or start to carry them from one State to another, and the act of turning a vacant car at an intermediate station can not be the use of that car in moving such traffic. This is the effect of the decision of the supreme court of appeals of Virginia in Norfolk & Western R. Co. v. Commonwealth, 24 S. E., 838. That court held in that case, upon the authority of Coe v. Errol, that a train of empty coal cars on its way to procure a load of coal, which the carrier intended to transport with these cars from one State to another, was not engaged in interstate commerce, and would not be until it was loaded with the articles of such commerce to be carried to another State or started on the way. Speaking of the effect of the intention of the carrier to use the cars in moving interstate traffic, that court said: "The common carrier has the same right to change his mind and ship on other cars than those which he may have provided for that purpose, and the cars which were intended for that purpose may never be used. The rule fixed by the supreme court in the one case seems equally applicable to the other." United States v. Boyer, 85 Fed., 425, 432; Kelley v. Rhoads, 63 Pac., 935.

The power of Congress over this subject was limited to the regulation of commerce among the States. It intended to exercise that power, but not to transgress its bounds. It prohibited the hauling of cars used in moving interstate traffic unless equipped as the act directs. The intention to use cars for that purpose does not constitute such a use, because that intention may change. Coe v. Errol, 116 U. S., 526; Norfolk & W. R. Co. v. Commonwealth, 24 S. E., 838. The fact that such cars have been or will be so used does not constitute their use in moving interstate traffic, because the prohibition is not of the hauling of cars that have been or will be used in such traffic, but only of those used in moving that traffic. Cars loaded with articles of interstate commerce

and started toward their ultimate destination, whether in trains, in yards, or on sidetracks, may well be held to come within the terms of this statute and the intent of Congress. But vacant cars which are not and may never be so used can not be held to come within the fair import of the terms of this law, either because their owner intends to use them for that purpose at some future time or because they have been or will be so used. Empty cars in repair shops, in yards, on sidetracks, those in use to transport traffic within a State, and for that purpose alone, are not in use to move articles of interstate commerce, and do not fall under the ban of this law. Neither the empty dining car standing upon the sidetrack, nor the freight engine which was used to turn it at the little station in Utah, were then used in moving interstate traffic within the meaning of this statute, and this case did not fall within the provisions of this law. The judgment below must accordingly be affirmed, and it is so ordered.

53 Thayer, circuit judge:

I am unable to concur in the conclusion announced by the majority of the court, that the act of Congress of March 2, 1893 (27 St. 531, c. 196), does not require locomotive engines to be equipped with automatic couplers; and I am equally unable to concur in the other conclusion announced by my associates, that the dining car in question, at the time of the accident, was not engaged or being used in moving interstate traffic.

In my judgment it is a very technical interpretation of the provisions of the act in question, and one which is neither in accord with its spirit nor with the obvious purpose of the lawmaker, to say that Congress did not intend to require engines to be equipped with automatic couplers. The statute is remedial in its nature; it was passed for the protection of human life, and there was certainly as much, if not greater, need that engines should be equipped to couple automatically, as that ordinary cars should be so equipped, since engines have occasion to make couplings more frequently. In my opinion, the true view is that engines are included by the words "any car" as used in the second section of the act. The word "car," is generic and may well be held to comprehend a locomotive or any other similar vehicle which moves on wheels; and especially should it be so held in a case like the one now in hand, where no satisfactory reason has been assigned or can be given, which would probably have influenced Congress to permit locomotives to be used without automatic coupling appliances.

I am also of the opinion that within the fair intent and import of the act, the dining car in question, at the time of the accident, was being hauled or used in interstate traffic. The reasoning by which a contrary conclusion is reached seems to me to be altogether too refined and unsatisfactory to be of any practical value. It was a car which, at the time, was employed in no other service than to furnish meals to passengers between Ogden and San Francisco. It had not been taken out of that service, even for repairs, or for any other use, when the accident occurred, but was engaged therein to the same extent that it would have been if it had been hauled through to Ogden, and if the accident had there occurred, while it was being turned to make the return trip to San Francisco. The cars composing a train which is regularly employed in interstate traffic

ought to be regarded as used in that traffic while the train is being made up, with a view to an immediate departure on an interstate journey, as well as after the journey has actually begun. I accordingly dissent from the conclusion of the majority of the court on this point.

While I dissent on the foregoing propositions, I concur in the other view which is expressed in the opinion of the majority, to the effect that the case discloses no substantial violation of the provisions of the act of Congress, because both the engine and the dining car were equipped with automatic coupling appliances. In this respect the case discloses a compliance with the law, and the ordinary rule governing the liability of the defendant company should be applied. The difficulty was, that the car *and engine were equipped with couplers of a different pattern, which*
would not couple for that reason without a link. Janney couplers
54 and Miller couplers are in common use on the leading railroads of the country, and Congress did not see fit to command the use of either style of automatic coupler to the exclusion of the other, while it must have foreseen that, owing to the manner in which cars were ordinarily handled and exchanged, it would sometimes happen, as in the case at bar, that cars having different styles of automatic couplers would necessarily be brought in contact in the same train. It made no express provision for such an emergency, but declared generally that after a certain date cars should be provided with couplers coupling automatically. The engine and dining car were so equipped in the present instance, and there was no such violation of the provisions of the statute as should render the defendant company liable to the plaintiff, by virtue of the provisions contained in the eighth section of the act. In other words, the plaintiff assumed the risk of making the coupling, in the course of which he sustained the injury. On this ground I concur in the order affirming the judgment below.

Filed August 28, 1902.

55 JUDGMENT.

And on the twenty-eighth day of August, A. D. 1902, in the record of the proceedings of said circuit court of appeals is a judgment in said cause, in the words and figures following, to wit:

United States circuit court of appeals, eighth circuit, May term, 1902.

THURSDAY, *August 28, 1902.*

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
SOUTHERN PACIFIC COMPANY. } No. 1722.

In error to the circuit court of the United States for the district of Utah.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Utah, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and

the same is hereby, affirmed with costs; and that the Southern Pacific Company have and recover against W. O. Johnson the sum of twenty dollars for its costs herein and have execution therefor.

August 28, 1902.

56 *Clerk's certificate.*

United States circuit court of appeals, eighth circuit.

I, John D. Jordan, clerk of the United States circuit court of appeals for the eighth circuit, do hereby certify that the foregoing fifty-six pages contain a full, true, and complete transcript of all the pleadings, proceedings, and record entries (except the proceedings and papers filed on the writ of error from the Supreme Court) in a certain cause wherein W. O. Johnson was plaintiff in error and the Southern Pacific Company was defendant in error, No. 1722, May term, 1902, as full, true, and complete as the same remain on file and of record in my office.

I do further certify that the mandate in said cause was issued to the circuit court of the United States for the district of Utah on the first day of November, A. D. 1902.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, at office in the city of St. Louis, Missouri, in the eighth circuit, this eleventh day of July, A. D. 1903.

[SEAL.] JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

57 (Indorsed:) File No., 18929. Supreme Court U. S., October term, 1903. Term No., 279. W. O. Johnson, petitioner, vs. Southern Pacific Company. Writ of certiorari and return thereto. Filed July 13th, 1903.

58 In the Supreme Court of the United States, October term, 1903.

W. O. JOHNSON, PETITIONER,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 279.

On a writ of certiorari to the U. S. circuit court of appeals for the eighth circuit.

W. O. JOHNSON, PLAINTIFF IN ERROR,
vs.
THE SOUTHERN PACIFIC COMPANY. } No. 362.

In error to the U. S. circuit court of appeals for the eighth circuit.

Stipulation as to printing of records.

Come now the parties to the above-entitled causes, by their counsel, and stipulate that the transcript of the record in case No. 279, W. O. Johnson, petitioner, vs. The Southern Pacific Company, shall be printed;

that the record in case No. 362, W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company, shall not be printed, except the portions thereof constituting the writ of error and other proceedings subsequent thereto; that both cases shall be submitted to and considered by the court upon such printed record and this stipulation, and that this stipulation shall in no way prejudice the rights of the defendant in error in No. 362 or affect its right to object to the jurisdiction of the court in that case on the writ of error.

59

L. A. SHAVER,
Counsel for Petitioner in No. 279 and Plaintiff in Error in No. 362.
MAXWELL EVARTS,
Counsel for Respondent in No. 279 and Defendant in Error in No. 362.

60 (Indorsed:) Supreme Court of the U. S., October term, 1903. W. O. Johnson, petitioner, vs. Southern Pacific Company, No. 279. W. O. Johnson, plaintiff in error, vs. The Southern Pacific Company, No. 362. Stipulation as to printing records. Maxwell Evarts, counsel for respondent in No. 279 and defendant in error in No. 362, 120 Broadway, Borough of Manhattan, New York City.

61 (Indorsed:) File Nos., 18929 & 19013. Supreme Court U. S., October term, 1903. Term Nos., 279 & 362. W. O. Johnson, petitioner, vs. Southern Pacific Co., and W. O. Johnson, plff. in error, vs. Southern Pacific Co. Stipulation as to printing records. Filed Nov. 18th, 1903.

O